MOTION FILED
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No. 03-531

IN THE
Supreme Court of the United States

YARDARM RESTAURANT, INC.,

Petitioner,

v.

THE CITY OF POMPANO BEACH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF FLORIDA, FOURTH DISTRICT

MOTION OF SUGAR CANE GROWERS COOPERATIVE OF FLORIDA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Sugar Cane Growers Cooperative of Florida hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for Petitioner has been obtained. The consent of the attorney for Respondent was requested but refused.

As more fully explained at pages 1-3 of the attached brief under "Interest of *Amicus Curiae*," the interest of Sugar Cane Growers Cooperative of Florida in this case arises from the fact the Cooperative and its members are property owners in Palm Beach County that is adjacent to Broward County and is served by the same Florida District Court of Appeals that rendered the decision below. Accordingly, they will be substantially affected by that court's ruling.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, Sugar Cane Growers Cooperative of Florida ("SCGC") submits this brief in support of the Petition for Writ of Certiorari presented by Yardarm Restaurants, Inc. seeking review of the decision of Florida's Fourth District Court of Appeals in the case of *City of Pompano Beach v. Yardarm Restaurant, Inc.*, reported at 834 So. 2d 861 (Fla. App. 2002) (Yardarm II).[1]

Sugar Cane Growers Cooperative of Florida is a cooperative agricultural marketing association formed under Chapter 618 Florida Statutes. It is owned by 54 farmer-members who grow sugarcane on approximately 74,000 acres of land in Palm Beach County, Florida. The primary functions of the Cooperative are to harvest, process the sugarcane and market the raw sugar. This land lies within the boundaries of the Congressionally designated Everglades Agricultural Area (EAA). Stormwater from EAA farms drains, in part, to the Everglades ecosystem that is the largest subtropical wetland in North America. For this reason, EAA farmers have been subjected to extraordinary scrutiny and government regulation of their farming practices. It is also noteworthy that the 1994 Everglades Forever Act requires the construction of the Everglades Construction Project which includes 42,000 acres of stormwater treatment areas all within the boundaries of the EAA. The legislature found that this project "represents by far the largest environmental cleanup program of this type ever undertaken." § 373.4592(1)(h) Florida Statutes. Overlaying this ambitious and now mostly

1. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the SCGC, made a monetary contribution specifically for the preparation or submission of this brief.

completed environmental restoration project is the Comprehensive Everglades Restoration Plan (CERP) authorized by Congress as part of the Water Resources Development Act of 2000 (WRDA 2000), Pub. L. No. 106-541, § 602(a), 114 Stat. 2693. To achieve CERP's goals, Congress authorized more than $1 billion in initial projects which include a large water storage reservoir within the EAA. *See, e.g.*, § 601(b)(2), 114 Stat. 2681-2683. Farmland within the EAA is coveted for environmental restoration purposes. Those, in government who are interested in obtaining EAA lands for environmental restoration purposes have a built-in incentive to keep land prices low by preventing non-agricultural development of EAA farmland; or by making farming uneconomical through regulation so they can acquire the land for next to nothing.

The Cooperative and its members have a direct stake in the outcome of this case. The Cooperative and its farmer members own and lease significant amounts of land. These farmers are subject to numerous laws, regulations, ordinances and associated permits such as the land use regulations and permits involved in this case. The Cooperative and its members cannot farm their land unless they have consumptive use and surface water management permits issued by the South Florida Water Management District ("District") and enforced by executive and management personnel on behalf of the District. Farmers who violate any conditions of these permits are subject to a range of criminal and civil enforcement actions that include civil fines of up to $10,000 per day. § 373.129(5) Florida Statutes. Chapter 40E-63, Florida Administrative Code, imposes the most stringent Agricultural Best Management Practices (BMPS) regulations in the country. Farmers must have an approved BMP plan in place and must measure every

drop of water and every ounce of phosphorus leaving their farms. Farmers must demonstrate that the BMP plan actually achieves verifiable phosphorus reduction requirements under the rule. Farms are subject to inspections and audits by staff of the District and are subject to the same criminal and civil enforcement actions listed above. These farmers cannot farm unless they have permits that are fairly enforced by the executives and managers acting on behalf of the District. They cannot make non-agricultural uses of their lands unless they have building and development permits issued by local, county and state governments upon which they can rely before beginning development. Amicus, therefore, has a vital interest in assuring that the Takings Clause is interpreted fairly. It is imperative that rights in real property, along with the necessary permits these farmers must have to make any economic use of their lands are recognized as being fundamental rights that deserve substantive due process protection. And these fundamental rights are of no value if government officials acting under color of law are permitted to deprive citizens of their constitutional rights when these objectives are accomplished through executive instead of legislative action.

INTRODUCTION

This case is a classic example of why it is necessary to provide substantive as well as procedural due process protections in a permitting context for owners of real property. The property owner in this case won time and time again before four Florida circuit court judges, made multiple trips to the Florida Court of Appeals and still was effectively blocked from building on its property and ended up losing the property in foreclosure. The trial court found that the City, acting through its highest officials—its Mayor, City

Manager, City Attorney and Chief Building Official—"engaged in unreasonable, protracted litigation; repeatedly ignored court orders to apply the February 14, 1974 regulations to Yardarm's permit applications; and engaged in stonewalling tactics to block the Yardarm project." *City of Pompano Beach v. Yardarm Restaurant, Inc.* 834 So. 2d 861, at 868 (Fla. App. 2002). The appellate court found, rather inexplicably given these facts, that Yardarm had not been deprived of substantially all use of its property. But what is most remarkable about this case is the finding of the appellate court that the developer had no substantive due process claim because the property interest the landowner possessed was created by state law, not the United States Constitution, and that the any deprivation of the property owner's rights was done by executive and not legislative acts of the City. This doctrine was expounded in *McKinney v. Pate*, 20 F.3d (11th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 1110 (1995), an employment termination case, in which the court held that "In short, areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because 'substantive due process rights' are created only by the Constitution.'" *See, e.g., id.*, at 1556. *McKinney* has since been applied in the case below and in many other state and federal courts within the Eleventh Circuit to a broad array of cases involving rights in real property. This brings the law in that circuit into clear conflict with the takings and substantive due process jurisprudence of this Court and of all the other federal courts of appeal.

SUMMARY OF THE ARGUMENT

The decision below treats a substantive due process deprivation claim as being one and the same as a taking. The action of the City, which should be characterized as a violation of substantive due process resulting in a taking, is instead characterized as merely an alleged violation of substantive due process. The court below considers rights in real property less worthy of protection than other fundamental liberties guaranteed in the Constitution. Even that limited substantive due process remedy is taken away from the landowner because the deprivation occurred by means of executive and not legislative actions by the City. The notion that rights in real property are less worthy of protection than other fundamental rights guaranteed by the Constitution has no foundation in the history of the laws implementing the Fourteenth Amendment or in the decisions of this Court. And the notion that there is no remedy when a government actor takes away rights by executive as opposed to legislative action is a modern invention by one Circuit Court of Appeals which instructs and invites government actors to find new and creative ways to obstruct lawful agricultural and commercial uses of real property and, in extreme cases like this one, to obtain private property for public use without just compensation.

If permitted to stand, the opinion below will seriously erode the constitutional protection for real property rights of *Amicus Curiae* and other real property owners in Florida who must have permits on which they can rely before they can put their properties to productive economic uses. And if permits are issued and enforced by executives and officers acting on behalf of government in ways not bearing a substantial relationship to a legitimate public purpose, then property owners must have available a remedy that prevents an unlawful deprivation of their constitutional rights. The decision in the case below robs landowners in Florida of that remedy.

REASONS FOR GRANTING THE PETITION

I. This Case Is Both A Regulatory Taking And A Deprivation Of Substantive Due Process.

Of all previous taking and substantive due process cases that have been heard by this Court, the facts in this case most closely parallel those in *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999). There, as here, the property owner brought an action under 42 U.S.C. § 1983 claiming both a taking and a violation of substantive due process. "After five years, five formal decisions, and 19 different site plans [records citations omitted], Del Monte Dunes decided the city would not permit development of the property under any circumstances." *See, e.g., id.*, at 698. The District Court charged the jury, properly so according to this Court, to find for Del Monte Dunes if it had been denied all economically viable use of its property or that the regulation did not substantially advance a legitimate public purpose. The jury was further instructed that "The regulatory actions of the city or any agency substantially advanc[e] a legitimate public purpose if the action bears a reasonable relationship to that objective." *See, e.g., id.*, at 701. The jury delivered a general verdict for Del Monte Dunes on its taking and equal protection claims. In affirming this verdict, this Court found that "The jury, furthermore, was not asked to evaluate the city's decision in isolation but rather in context, and, in particular, in light of the tortuous and protracted history of attempts to develop the property." *See, e.g., id.*, at 706. The question submitted to the jury was whether "the city's particular decision to deny Del Monte Dunes' final development authority was reasonably related to the city's proffered justification.'" *See, e.g., id.*, at 706.

There are great factual similarities between *Del Monte Dunes* and the case below. Both developers were ultimately denied any right to develop their properties and both properties ultimately ended up in public ownership. Liability was determined by the jury in *Del Monte Dunes*. The case below was bifurcated with the Florida Circuit judge finding liability and the jury determining damages. Del Monte Dunes ultimately sold its property to the city at far less than market value. Yardarm lost its property in foreclosure. The most striking differences are that Del Monte Dunes initially recovered some of its investment and the wrongs done to it by the City were remedied by a damage award.

The difference between these cases is that *Del Monte Dunes* was decided in accordance with the long history of the takings jurisprudence of this Court while *Yardarm* was not. This Court in *Del Monte Dunes* applied both parts of the *Agins* test. "The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citations omitted], or denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 477 U.S. 255, 260 (1980). The case below ignores the first part of the *Agins* test. Clearly, the City of Pompano Beach denied Yardarm the right to build its already permitted hotel tower so that adjoining property owners could enjoy an unobstructed view of the lighthouse, the Hillsboro Inlet and the Atlantic Ocean. The City's action in this case does not advance a legitimate state interest.

The case below illustrates why it is necessary to extend substantive as well as procedural due process protection to rights in real property. The Yardarm property owners received many years of procedural due process in the Florida courts but none of these procedural protections could save the

property from the determined and unconstitutional efforts of the city to prevent any development of the property. It is not surprising that these procedural measures provided no remedy given the fact that the Eleventh Circuit and Florida courts regard rights in real property as second class constitutional rights.

II. The Constitution Recognizes No Dichotomy Between Property Interests And Other Liberty Interests. Nor Does It Recognize Any Less Of A Due Process Violation When The Deprivation Occurs Because Of An Executive Rather Than A Legislative Act.

In his opinion for the majority in *Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972), Justice Stewart expressly rejected the notion that property rights are entitled to less protection than other personal liberty interests. He wrote that ". . . the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." *See, e.g., id.*, at 552.. His opinion quotes *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948) which says "Equality in the enjoyment of property rights was regarded by the framers of the amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the amendment was intended to guarantee."

The court below quotes with approval the decision in *Reserve Limited v. Town of Longboat Key*, 933 F. Supp. 1040, 1043-44 (M.D. Fla. 1996) which said "First, the purported property interest (i.e. Reserve's interest in the revoked building permit) is created by state law and falls comfortably short of a fundamental right both grounded in the Constitution and 'implicit in the concept of ordered liberty.'" The second cited factor is that the permits were issued by the City's town

manager and public works director, both of whom perform executive rather than legislative functions, and the actions of each of these officials effect only a small group of individuals and not the general population. But surely, 42 U.S.C. § 1983 was intended to protect property rights of individuals.

The error in this reasoning is compound. First, property rights are fundamental rights entitled to protection under 42 U.S.C. § 1983. And, property rights are normally created and defined by state law. In the predecessor case, *Reserve Limited v. Town of Longboat Key*, 17 F.3d 1374, 1380 (11th Cir. 1994), the court held that "As Reserve possessed a building permit and expended large amounts of money in reliance thereon, Reserve had, under Florida law, a vested property right in its permit." The court therefore concluded that ". . . Reserve had a property interest protectible under the Fourteenth Amendment." The court below believes that this *Reserve* decision is no longer good law because of the *McKinney* doctrine which is recognized only by the Eleventh Circuit and courts of states within that circuit. But this doctrine has no foundation in the Constitution or in the previous decisions of this Court.

The other fundamental error is the artificial distinction drawn between legislative as opposed to executive deprivations of constitutional rights. This Court as early as 1879 recognized that "The prohibitions of the Fourteenth Amendment are directed to the States and they are, to a degree restrictions of State Power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative or judicial." *Ex Parte Virginia*, 100 U.S. 339, 346 (1879). It is difficult to ascertain the source of the executive

as opposed to legislative acts distinction created by the Eleventh Circuit Court of Appeals. It is grounded, in part, on *Collins v. City of Harper Heights, Texas*, 503 U.S. 115 (1992) which held that "The City is not vicariously liable under § 1983 for the constitutional torts of its agents: It is only liable when it can fairly be said that the City itself is the wrongdoer." *See, e.g., id.*, at 122. Reliance on that case is misplaced. The plaintiff in that action was the widow of a municipal employee who died an accidental death of asphyxia after entering a sewer system and claimed the City had failed to properly train its municipal workers. This case should be analyzed instead under the principles announced in *Monnell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), the seminal case which first extended § 1983 liability to municipalities. It recognized as constitutional violations ". . . deprivations visited pursuant to governmental 'custom' even though such a custom had not received formal approval through the body's official decision making channels." *See, e.g., id.*, at 691. It is difficult to reconcile the *McKinney* doctrine with the express language of § 1983 which applies to any custom, or usage as well as any statute, regulation or ordinance which deprives any person of any rights, privileges or immunities secured by the Constitution. If the framers of this section intended that it only apply to legislative actions, why did they include the customs or usage language? And the statute applies to rights secured by the Constitution, not just rights created by the Constitution. The *Yardarm* case is one in which the highest municipal officials, acting officially and in concert with the City's elected officials, deliberately deprived the landowner of its constitutional rights in real property. It can safely be said that the city itself is the wrongdoer and is, as the finder of fact below correctly found, liable for damages under § 1983.

CONCLUSION

The decision below significantly erodes the constitutional protection of rights in real property for landowners in the State of Florida and other states within the jurisdiction of the Eleventh Circuit Court of Appeals. There is no support in the Constitution or the decisions of this Court for the doctrine that real property interests are inferior to other constitutional rights and that deprivations of such rights will go without a § 1983 remedy if done by executive as opposed to legislative actions.

The decision below has the pernicious effect of giving municipalities and others acting under color of state law a road map for how they can violate people's constitutional rights in real property and get away with it. This turns the Fourteenth Amendment on its head. The amendment was designed to vindicate constitutional rights for all, including state created rights in real property. If allowed to stand, the decision below will positively encourage municipal decision makers to create arbitrary and capricious roadblocks for owners who wish to put their properties to commercial or agricultural use. And it sends the economically discouraging message that permits that all owners must have before making commercial or agricultural use of their property can be withdrawn with impunity.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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